

Television programming or other services in which no tangible personal property is transferred are not subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, and Service Use Tax liability. See 86 Ill. Adm. Code 130.101 et. seq. (This is a GIL).

August 20, 2004

Dear Xxxxx:

This letter is in response to your letter of July 17, 2002, your subsequent correspondence of November 7, 2002, and December 16, 2002, and various telephone conversations in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

We are responding to your information letter dated January 4, 2002 (enclosed) in which you concluded that our client's personal television services, when separately stated on a customer's invoice, were not subject to Illinois' Sales and Use Tax. After reviewing your letter and 2 Ill. Adm. Code 12200.120 subsections (b) and (c), it has come to our attention that the information letter that we received is not a letter ruling binding upon the department.

Pursuant to 2 Ill. Adm. Code 12200.120 subsections (b) and (c), we respectfully request that a binding letter ruling be issued on our client's behalf, based on the facts presented. As required by 2 Ill. Adm. Code 12200.120 subsections (b) and (c), we are providing the following information:

Names of Parties
NAME/ADDRESS

To the best of our knowledge, the issues presented in our ruling request are not being examined in the connection with active audit or examination by the Department of Revenue.

For your convenience, we are providing the following documents:

1. ABC's original request letter updated to include the names relevant parties in the fact pattern and analysis. No other changes to the original fact pattern and analysis have been made.
2. A copy of your information letter dated January 4, 2002, concluding that personal television services, when separately stated on a customer's invoice, are not subject to Illinois Retailer's Occupation Tax, Service Occupation Tax, Services Use Tax, and Telecommunications Excise Tax liability.
3. An addendum analysis addressing the provision of infrequent software updates by XYZ

We respectfully request that the Illinois Department of Revenue contact us immediately in the event that a ruling adverse to the original guidance letter dated January 4, 2002 is contemplated. If you have any questions or need any additional information please do not hesitate to contact me.

STATEMENT OF FACTS

Overview

Our clients, BUSINESS, & XYZ are planning to offer personal television services to subscribers located in your state. BUSINESS & XYZ's personal television service will allow viewers to do the following:

1. Automatically record television shows and watch them at a later time.
2. Pause or record live television broadcasts.
3. Create personalized programming based upon the viewer's previous viewing patterns.
4. Receive special data and video content.

In order for a subscriber to obtain BUSINESS & XYZ's personal television service, a subscriber must purchase or have access to the following:

1. A Personal Video Recorder ('PVR') or Direct-to-Home Satellite Television Combo Box ('DSCB'), purchased from an unrelated third party retailer.
2. Television service via cable, satellite, or antennae.
3. A telephone line connected to the PVR's built-in modem or DSCB modem.
4. A current paid subscription to BUSINESS & XYZ's personal television service.

Operational Aspects

In order for a subscriber to subscribe to BUSINESS & XYZ's personal television service, the subscriber must first purchase a PVR or DSCB. PVRs and DSCBs are available for

purchase through unrelated third party retailers and consist of a set-top unit and remote control. It is our understanding that sales tax on the units is collected by retailers at the point of sale, where applicable. The manufacture and sale of PVRs and DSCBs have been licensed to independent third-party consumer electronics manufacturers. Please note, Direct-to-Home Satellite Combo Boxes have the same capabilities as PVRs, but are integrated to allow the viewer to use BUSINESS & XYZ's personal television service as well as receive direct-to-home satellite television programming. In all other aspects, PVRs and DSCBs are generally the same. Henceforth, both types of units will be referred to as PVRs.

PVRs come equipped with certain basic 'out-of-the-box' features. The basic features of PVRs are similar to video cassette recorders ('VCRs') in nature except that they permit VCR-like recording capabilities onto built-in hard drive as opposed to recording onto videocassettes. PVRs also provide viewers with several basic capabilities including: pause, rewind and fast forward navigation of live or recorded television and the ability to record selected programs by manually programming the PVR. PVRs have the capability to receive cable, satellite, and off-air television programming. **These capabilities exist independently of the personal television service provided by BUSINESS & XYZ.**

As noted above, BUSINESS & XYZ will offer enhancements to the inherent PVR capabilities to customers interested in subscribing to BUSINESS & XYZ's personal television service. However, customers purchasing PVR hardware are not obligated to subscribe to BUSINESS & XYZ's service. Essentially, a customer could purchase PVR hardware and connect it to their television source without activating BUSINESS & XYZ's programming and still receive a basic form of functionality from the PVR hardware. In order for a subscriber to receive XYZ's services, the subscriber must pay a subscription fee directly to XYZ (in the case of direct-to-home satellite subscribers, such as those subscribing to BUSINESS, the fee for XYZ's service will be invoiced by the direct-to-home satellite provider). The subscription fee is separate and distinct from the original purchase of the PVR from the unrelated third party retailer and is separately billed and collected by BUSINESS & XYZ. This fee is distinct from any fee paid for cable or direct-to-home satellite television programming services.

Subscribers may subscribe to BUSINESS & XYZ's personal television service in one of three subscription methods: (1) lifetime subscriptions (i.e. a one-time payment); (2) annual subscriptions (i.e. an annual payment); or (3) monthly subscriptions (i.e. a monthly payment).

In consideration of the subscription fees, BUSINESS & XYZ will provide the following services:

1. Electronic Program Guides -- The Electronic Programming Guides are delivered electronically on a nightly basis and stored on the hard drive of the subscriber's PVR. The Electronic Programming Guide contains approximately two weeks of television programming schedules and allows the customer to identify and schedule future recordings. The Electronic Programming Guide also contains program information that allows the subscriber to rate programs (using a 'thumbs up' or 'thumbs down' feature on the remote control), thus identifying a subscriber's preference for specific programming. From these ratings, BUSINESS & XYZ's personal television service will suggest similar television programming that the subscriber may enjoy.

2. Specialized Electronic Television Viewing Guides -- The Specialized Electronic Television Viewing Guides differ from the Electronic Programming Guide in that they offer enhanced graphics and formats. The subscriber can access the downloaded programming guides via their PVR and browse them for upcoming television programs. Once the subscriber identifies an upcoming program that he/she wishes to view, the subscriber can record the selected program for later viewing. The specialized viewing guides are also delivered electronically on a nightly basis and stored on the hard drive of the subscriber's PVR.

As part of the personal television service, BUSINESS & XYZ will provide two types of specialized electronic television viewing guides:

- An electronic magazine that organizes upcoming television and programming by topic (e.g. comedy, sports, drama and special events).
 - Network Showcases organized by topic and sorted by separate networks (e.g. NBC, CBS, HBO).
3. Programming Content Specifically Created By BUSINESS & XYZ -- As part of the subscription to the personal television service, BUSINESS & XYZ will provide several television programs including a weekly half hour preview show. The preview show will offer commentary and viewing suggestions of selected upcoming programming. This service is delivered via broadcast networks during off-peak hours and is recorded on the hard drive of the subscriber's PVR. The subscriber can view or delete this programming from his/her PVR at any time.

Delivery of the of the Electronic Programming and Specialized Electronic Television Viewing Guides is accomplished via telephone modem connection originated by the subscriber's PVR to BUSINESS & XYZ's Operation Facility located outside of your state. The Operation Facility consists of a series of computer servers that store and transmit BUSINESS & XYZ's information and services to subscribers. The electronic transmissions are also delivered without the transfer of any tangible personal property.

Once BUSINESS & XYZ's Operation Facility verifies that the customer is a valid subscriber, the Electronic Program Guide, Electronic Content and Viewing Guides are electronically downloaded onto the hard drive of the subscriber's PVR. In some instances, updates to the PVR's operating system will also be downloaded during this time. In addition to the electronic transmissions, the Electronic Program Guide, Electronic Content and Viewing Guides may also be transmitted to the subscriber's PVR via direct-to-home satellite transmission or other electronic media. It is important to note that in all instances the Electronic Program Guide, Electronic Content and Viewing Guides are delivered electronically and not by the use of diskettes, CD-Rom or other tangible mediums.

Future Services and Revenue

In the future, BUSINESS & XYZ may provide enhanced services via modem, digital subscriber line (DSL), satellite or other high-speed connection.

In addition, BUSINESS & XYZ may receive additional revenues from the following:

1. Targeted advertising
2. Promotional content programming.
3. Select and purchase products promoted in specialized programming.
4. Delivery of premium programming such as music, games, and motion pictures ordered by a subscriber and delivered and stored on the hard drive of subscriber's PVR. A separately stated fee may be charged for the premium programming.
5. The sale of audience research and measurement.

Billing Procedures

Subscriber's can subscribe to BUSINESS & XYZ's personal television service in the following ways:

1. Customers may contact BUSINESS & XYZ via a toll free number or may subscribe to the service via the World Wide Web.
2. If the subscriber purchases a DSCB, the subscriber can sign up for service by contacting his/her direct-to-home satellite provider using a toll free number or via the World Wide Web. The subscription fee for the personal television service fee may be separately stated on the subscriber's invoice, or included as a component of a premium suite of services.

ISSUES

1. What is your state's sales & use, telecommunications, and/or other gross receipts tax treatment of BUSINESS & XYZ's sale of personal television services to customers located in your state as described in the statement of facts as presented?
2. In some instances BUSINESS & XYZ may offer personal television services in conjunction with other taxable and non-taxable services. Specifically, BUSINESS & XYZ may advertise a suite of services at one price point (i.e. PVR Service and Direct-to-Home Satellite Service), and using their billing system, separately calculate and apply the taxability to each unique component of the suite of services. Billing to the customer may be presented in one line item in the finished invoice. In some instances, customers may only have access to an electronic invoice via the internet. Will this billing approach make any difference to the taxability of BUSINESS & XYZ's service?
3. When personal television services are provided by a direct-to-home satellite provider, are the fees collected from subscribers exempt from local taxation under section 602 of the Federal Telecommunications Act?
4. Are there any other state and/or local taxes which may apply to BUSINESS & XYZ's services?

ANALYSIS OF ILLINOIS LAW

Overview

Illinois sales and use taxes are contained in four separate acts: the Retailers' Occupation Tax (ROT), the Service Occupation Tax (SOT), the use tax and the service use tax.

The ROT is imposed on persons engaged in the business of selling tangible personal property at retail (35 Illinois Compiled Statutes (ILCS) 120/2). All sales of tangible personal property are presumed subject to the ROT until the contrary is established (35 ILCS 120/7). The tax is measured by the 'gross receipts' received from such sales (86 Illinois Admin. Code 130.101). ROT is not imposed on intangible personal property or real property (86 Illinois Admin. Code 130.120(a),(b)). 'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser for the purpose of use or consumption for a valuable consideration (35 ILCS 120/1).

The SOT is imposed on persons engaged in the business of making sales of services. Tax is not imposed on the service itself, but on the selling price of tangible personal property transferred incident to the service. Also, SOT is not imposed on the selling price of property that is subject to ROT or use tax (86 Illinois Admin. Code 140.125(f)). A 'sale of service' means any transaction except a retail sale of tangible personal property subject to ROT or a sale or transfer of tangible personal property as an incident to the rendering of service (See, 86 Illinois Admin. Code 140.201(e)). Other exceptions apply but are not relevant to this analysis.

As noted above, the tax on services applies where tangible personal property is transferred. BUSINESS & XYZ's personal television service does not involve a transfer of tangible personal property under Illinois's sales and use tax laws. Based upon our analysis of Illinois law, administrative guidance and information letters, it is our conclusion that personal television services are non-taxable services in Illinois. Accordingly, the furnishing of personal television services by BUSINESS & XYZ to subscribers in Illinois by the aforementioned methods would not be subject to Illinois sales tax.

However, since personal television services are composed of several unique aspects, including electronic programming guides, unique television programming, and in some instances updates to the software operating system of the PVR, we will also address the application of telecommunications and software services to personal television services.

Telecommunications

Telecommunications are specifically subject to the Illinois Telecommunications Excise Tax Act and the Illinois Telecommunications Municipal Infrastructure Maintenance Fee Act (See, 35 ILCS 630/1 - 630/21; 35 ILCS 635/5). 'Telecommunications' includes messages, or information transmitted through use of local, toll and wide area telephone service, channel services, telegraph services, teletypewriter service, computer exchange services; cellular mobile telecommunication service, specialized mobile radio services, paging services, or any other form of mobile and portable one-way or two way communications, or any transmission of messages or information by electronic or similar means (35 ILCS 630/2(c)).

BUSINESS & XYZ's personal television service does not fall within the purview of taxable 'telecommunications.' A subscriber's PVR however, will initiate a call via

telephone modem to BUSINESS & XYZ's servers in order to download the program and viewing guides. Although the definition of telecommunication includes the transmission of information by telephone, BUSINESS & XYZ's service should be distinguished from telephone transmissions to which the tax is meant to apply because the electronic information and programming guides sent to subscribers is a one-way communication on a non-interactive basis. Private letter ruling, ST 91-0909-PLR supports this contention.

In private letter ruling, ST 91-0909-PLR, (Nov. 21, 1991) an electronic provider of information sent to subscribers one-way through satellite technology and via FM sideband radio was not subject to the Telecommunications Excise Tax. BUSINESS & XYZ's service is no different. Electronic programming and viewing guides are sent via telephone modem and satellite to subscribers. While the PVR will originate a call to download information, the information is sent one-way and is not interactive (i.e., the subscriber cannot communicate with BUSINESS & XYZ). Accordingly, BUSINESS & XYZ's service is not subject to the Telecommunications Excise Tax.

In private letter ruling, ST 93-0472-PLR, (Sep. 22, 1993), the bureau ruled that a company's one way messaging services were exempt from the telecommunications tax. Specifically, the company argued that the excise tax was meant to apply to those businesses that provide customers a means to transmit or communicate to third parties. In BUSINESS & XYZ's case the focus of its service is not that of providing communications access, but instead, the focus is the provision of a personal television service. The fact that BUSINESS & XYZ's personal television service utilizes telephone lines and satellite to transmit its information should not be determinative that it is providing a telecommunications service (See also, General Information Letter, ST 94-0079-GIL, (Mar. 31, 1994)--interactive entertainment system which utilized television programming and telephone lines did not incur Telecommunications Excise Tax liability on its monthly subscription fees).

The Internal Revenue Service has also addressed taxable telecommunications services in the form of providing two-way communications. In Internal Revenue Letter Ruling 9228016, (Apr. 9, 1992), the Service ruled that utilization of a data network to access the host computers of independent service providers was not a taxable telecommunication service. The Service reasoned that since the network did not permit conversational intercommunication with all other subscribers to the network, the service was not taxable. Similarly, BUSINESS & XYZ's personal television services cannot be used by subscribers to contact other people. Applying the IRS's reasoning then, BUSINESS & XYZ's services should not be subject to the Illinois telecommunications Excise Tax.

Television & Cable Services

There are no specific state sales or use tax provision regarding cable television services and thus, such services are not subject to the Telecommunication Excise Tax (See, General Information Letter, ST 99-0028-GIL (Jan. 8, 1999)).

BUSINESS & XYZ charges a subscription fee for access to its personal television and information service similar to those of a cable/ satellite service and therefore, such charges are not subject to the Illinois Telecommunications Excise Tax. Under Illinois law persons who provide satellite television services, including basic network channels,

premium channels, pay per view movies, sporting events, etc., are not subject to the Telecommunications Excise Tax (See, General Information Letter, ST 95-0220-GIL, (May 25, 1995)). Given that BUSINESS & XYZ's services provide one-way audio and video programming services like those of a cable television/satellite service, its services likewise should be exempt from any tax.

In General Information Letter, ST 94-0079-GIL, (March 31, 1994) the Department ruled that a taxpayer's interactive information and entertainment system that utilizes television programming and telephone lines does not incur Telecommunications Excise Tax Liability on its monthly subscription fees. The court found that the taxpayer's subscription based interactive entertainment system did not fall within the definition of Telecommunications. BUSINESS & XYZ's services are analogous to the services in General Information Letter, ST 94-0079- GIL. BUSINESS & XYZ offers subscribers interactive electronic programming guides that allow subscribers to identify and schedule future television recordings and rate programs of interest, thus identifying a subscriber's preference for specific programming. From these ratings, BUSINESS & XYZ's personal television service will suggest similar television programming that the subscriber may enjoy. Since the functional similarities of BUSINESS & XYZ's services are like the non-taxable services described in General Information Letter, ST 94-0079-GIL, personal television service should also not incur Telecommunications Excise Tax liability.

Computer Software

Generally, sales of 'canned' computer software are taxable retail sales; however, if the computer software consists of custom computer programs or software, it is not taxable (86 Illinois Admin. Code 130.1935(c); General Information Letter, ST 94-0397-GIL, (Sep. 23, 1994)). Custom computer programs or software are prepared to the special order of the customer. All other retail sales of computer software are taxable.

BUSINESS & XYZ provides a nontaxable personal television service and is not in the business of selling software. Any software updates transmitted to a subscriber is transferred only as an incidental part of the provision of personal television services and no tangible personal property is exchanged. The software is not the true object of the transaction and has no value to the purchaser except as part of the personal television services rendered. 'If only services are provided and no tangible personal property is transferred incident to that service, the charges for those services would not be subject to ROT and use tax liability' (See, General Information Letter, ST 94-0397-GIL (Sep. 23, 1994)).

BUSINESS & XYZ provides its electronic programming and viewing guides to aid the subscriber in identifying and scheduling future recordings. As part of the service the electronic guides are enabled by software and downloaded to the subscribers' PVRs. The programming guides are similar to ones commonly received by cable or a direct-to-home services in that they describe upcoming programs as well as other features. Since programming guides delivered to subscribers have never been classified as software and there is never an exchange of tangible personal property, BUSINESS & XYZ's programming guides and service should be exempt from any ROT or use tax.

Local Taxation Preemption with respect to Direct-To-Home Services

In some instances, BUSINESS & XYZ's personal television service may be transmitted via satellite by a provider of direct-to-home satellite services. In such instances, the direct-to-home satellite service provider will purchase BUSINESS & XYZ's service for resale and sell the service to its customers. It is our belief that when BUSINESS & XYZ's personal television service is resold by a direct-to-home satellite service provider, the fee charged for the service is exempt from local taxation under Section 602 of the 1996 Federal Telecommunications Act.

Section 602 of the Federal Telecommunications Act of 1996, exempts a provider of direct-to-home satellite service from the collection or remittance, or both, of any tax or fee imposed by any local tax jurisdiction on direct-to-home-satellite service. The intent behind the Telecommunications Act is to remove the tax collecting burden of multiple local taxes from direct-to-home satellite providers and expanding technologies. The statute defines a 'provider of direct-to-home- services' as a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service. The term 'direct-to-home service' is defined as programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.

BUSINESS & XYZ's personal television service falls within the definition of 'direct-to-home service' since it consists of programming guides and programming that is transmitted by satellite directly to the subscribers' premises. Accordingly, the fees charged to subscribers for personal television services by a direct-to-home service provider are exempt from local taxation, including the local option sales taxes.

DEPARTMENT'S RESPONSE:

Please accept our apology for such a lengthy delay in responding to your inquiry. Our office has declined to issue a Private Letter Ruling on the various issues presented in your request. We hope that the following general information will provide your company with guidance regarding Illinois sales and excise tax liabilities, if any.

Electronic Program Guides
Specialized Electronic Television Viewing Guides
Programming Content Specifically Created by BUSINESS & XYZ

Illinois Retailers' Occupation and Use Taxes do not apply to sales of service that do not involve the transfer of tangible personal property to customers. However, if tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon which tax base the servicemen choose to calculate their tax liability. Television programming or other services in which no tangible personal property is transferred are not subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax liability.

The Electronic Program Guides, Specialized Electronic Television Viewing Guides, Programming Content Specifically Created by BUSINESS & XYZ, and the updates to the equipment's operating system that are delivered electronically to your company's customers may qualify as canned computer software. Generally, the retail sale, or transfer, of canned software intended for general or repeated use is taxable. Canned software is considered tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media. See 86 Ill. Adm. Code 130.1935(a). Upgrades of canned software are

considered to be sales of canned software and the whole agreement is taxable unless the upgrades are separately stated and taxed. See Section 130.1935(b).

Your letter states that the delivery of the electronically delivered viewing guides is originated by the telephone modem connection from the subscribers. The Telecommunications Excise Tax Act and Simplified Municipal Telecommunications Tax Act impose taxes on the act or privilege of originating in this State or receiving in this State intrastate and interstate telecommunications purchased at retail. See 35 ILCS 630/1 et seq. and 35 ILCS 636/5-1 et seq. As long as your company does not charge for the modem transmissions, those transactions would not generally be subject to the Telecommunications Excise Tax and Simplified Municipal Telecommunications Tax liability.

Future Services - target advertising, promotional content programming, delivery of premium programming (music, games, and motion pictures delivered electronically), and the providing of audience research and measurement

As noted above, Illinois Retailers' Occupation and Use Taxes do not apply to sales of services that do not involve the transfer of tangible personal property to customers. Please be aware that some of the electronically delivered services, such as the games etc., may be considered canned computer software that is taxable as tangible personal property even if that software is electronically delivered. See 86 Ill. Adm. Code 130.1935.

We cannot provide you with specific information regarding the taxation of the "select and purchase products promoted in specialized programming" because of the limited amount of information provided about those transactions.

In regards to the sales of audience research and measurement information, such sales would generally not be subject to either Telecommunications Excise Tax or Simplified Municipal Telecommunications Tax liability. The providing of that information or data through electronic means would also generally not be subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax or Service Use Tax liability because it does not constitute the transfer of tangible personal property but instead represents the transfer of intangibles. This supposition is based on the understanding that no transfer of software is made. See 86 Ill. Adm. Code 130.2105(a)(3). However, if that information is transferred on tangible personal property (such as a written report or compact disk etc.), that transfer could result in either Retailers' Occupation Tax or Service Occupation Tax liability.

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk